IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & GATEMBU JJ.A)

CIVIL APPEAL 258 OF 2012

BETWEEN

KENYA TEA GROWERS ASSOCIATION.....1ST APPELLANT

UNILEVER TEA KENYA LIMITED.....2ND APPELLANT

AND

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....RESPONDENT

(An Appeal from the Ruling and Order of the Industrial Court of Kenya at Nairobi (Madzayo, J) dated 22nd March, 2011

in

INDUSTRIAL CAUSE NO. 1281OF 2010*)*

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JUDGMENT OF THE COURT

1. This appeal arises from a ruling of the then Industrial Court (S. M. Madzayo, J) delivered on 22nd March 2011 restraining the appellants from suspending, locking out and or evicting its employees, members of the respondent union, from their residential houses and ordering all employees of the appellants who had not been allowed to resume duty due to the trade dispute to report back to their respective working stations within seven days without any loss of benefits.

Background

2. The 1st appellant is an association of tea growers in Kenya while the 2nd appellant is a tea grower in Kenya. The respondent is a trade union whose membership includes employees in tea estates.

3. Opposed to the use of tea plucking and pruning machines in the tea estates in Kenya on the grounds that the machines would replace human labour, the respondent (the Union) issued seven days strike notice to the appellants dated 11th October 2010.

4. On 14th October 2010, the 1st appellant, petitioned the High Court in Petition Number 64 of 2010 seeking reliefs against the Union. Amongst the reliefs sought in that petition was a declaration that the 1st appellant has the right to use tea plucking machines in its operations and the right to mechanise its operations; a declaration that the Union's strike notice issued on 11th October 2010 is unlawful; that the basis upon which the Union issued the strike notice of 11th October 2010 is an attempt to infringe on the 1st appellant's constitutional rights under Articles 27, 40, and 41 of the Constitution.

5. Alongside the petition, the appellant filed a chamber summons application dated 14th October 2010 before the High Court seeking a temporary injunction to restrain the Union and its members from causing, effecting, inciting or otherwise calling for a strike by the 1st appellant's employees pending the hearing and determination of the constitutional petition. On the same day, that is 14th October 2010, the High Court granted an *ex parte* order restraining the Union from causing, effecting, inciting or otherwise calling for a strike by the 1st appellant's employees. The chamber summons was fixed for *inter partes* hearing on 26th of October 2010.

6. On 21st October 2010 two things happened. The Union commenced action, by way of a memorandum of claim, before the Industrial Court, being Cause Number 1281 of 2010, seeking orders to restrain the 1st appellant, the 2nd appellant, Unilever Tea Kenya Limited and Eastern Produce Kenya Limited (collectively hereafter referred to as "the employers") from locking out, suspending, terminating or dismissing the Union members or evicting them from their residential houses pending the hearing of the suit.

7. The Union claimed in that suit that it had issued a seven days strike notice dated 11th October 2010 to the employers; that the strike notice expired on 17th October 2010; that the strike notice was in compliance with Section 76 of the Labour Relations Act and the Constitution; that the employers had failed to take advantage of the notice period to initiate dialogue with the Union and had resorted to intimidating the Union employees for participating in the strike and threatened to lock out, suspend, terminate, evict and or dismiss the Union employees.

8. Simultaneously with the memorandum of claim, the Union filed an application by way of notice of motion before the Industrial Court seeking an interlocutory injunction to restrain the employers from suspending, terminating, dismissing, locking out and evicting the Union members from their residential houses pending the hearing and determination of the suit before the industrial Court. On the same date, that is 21st October 2010, the Industrial Court certified that application as urgent and granted an order of an interlocutory injunction restraining the employers from suspending, terminating, dismissing, locking out and evicting the Union members from their residential houses or premises. The court scheduled the application for hearing, *inter partes*, on 28th October 2010.

9. On the same date, that is on 21st October 2010, the 1st appellant filed a notice of motion before the High Court in constitutional Petition Number 64 of 2010, seeking an order for committal for contempt of court against officials of the Union for disobedience of the court order given on 14th October 2010. Leave to make that application had been granted by the High Court on 19th October 2010.

10. In effect therefore, as at 21st October 2010, there were two somewhat conflicting orders in force, both issued *ex parte* by two different courts, arising from or in relation to the strike notice that had been issued by the Union on 11th October 2010. The first order is the one by the High Court given on 14th October 2010, restraining the Union from causing, effecting, inciting or otherwise calling for strike by the appellant's employees. The second order is the one issued by the Industrial Court on 21st October 2010 restraining the employers from suspending, terminating, dismissing, locking out and evicting the union members from their residential houses or premises.

11. Against that background, the employers filed a notice of motion dated 27th October 2010 before the Industrial Court seeking orders that: the hearing of their application be prioritised over that of the Union filed in court on 21st October 2010 that was scheduled to be heard *inter partes* on 28th October 2010; that the temporary injunction given on 21st October 2010 be set aside; that the proceedings in the Industrial Court be stayed pending the hearing and determination by the High Court of the constitutional petitions filed by the employers against the Union, namely petition numbers 62, 63 and 64 of 2010.

12. That application by the employers, dated 27th October 2010, was based on the grounds that the High Court had on 14th October 2010 issued an injunction restraining the Union from inciting or otherwise calling their members to strike; that the 1st appellant had to file contempt proceedings in the said petitions for violation of the order given on 14th October 2010; that the action taken by the Union to institute suit before the Industrial Court was to negate the effect of the court order given by the High Court on 14th October 2010 thereby undermining judicial process and the sanctity and authority of court orders; that in proceeding with the matter before the Industrial Court, there was a real risk of the Industrial Court arriving at a conflicting decision with that of the High Court in the constitutional petitions; that the Industrial Court would not be in a position to determine the substantive issues without taking into consideration the issues raised in the constitutional petitions; the constitutional court had to decide whether the employers have a right to mechanise the operations in the tea estates before the Industrial Court can decide issues relating to the terms of employment of the Union employees; that at the time the Union filed suit and sought injunction *ex parte* before the Industrial Court it did not disclose to that court the existence of the proceedings before the High Court.

13. The employers deposed in the supporting affidavits that despite having been served with the orders granted by the High Court on 14th October 2010, the Union had in breach of those orders proceeded to incite its members and agitate for a strike.

14. On 28th October 2010, when the Union's application dated 21st October 2010 was fixed for hearing *inter partes*, the Industrial Court adjourned the matter with the agreement of the parties to 1st November 2010 when, invoking its powers under Section 87 of The Employment Act 2007, Section 77(3) of the Labour Relations Act. That court ordered that:

> ***"1. THAT, the strike action be called off forthwith.***
>
> ***2. THAT, there should be no victimization whatsoever of any employee and or employees of the Respondents.***
>
> ***3. The Labour Commissioner, Ministry of Labour to act as the Chairman and set up the mechanism to engage the parties herein, for a reconciliation and file the Report in Court within the next ten (10) days from the date hereof, i.e. on 11th November, 2010.***
>
> ***4. Order Number (2) of the Orders dated 21st October, 2010 be and is hereby extended to 12th November, 2010.***
>
> ***5. Further mention on 12th November, 2010 at 2.30 p.m."***

15. Pursuant to that order the parties attended a consultation meeting before the Chief Industrial Relations Officer on 9th November 2010 and on 11th November 2010 a report of the conciliator was filed in court. According to the appellants, the conciliator misinterpreted the order of the Industrial Court given on 1st November 2010 to mean that the Union employees could unconditionally return to work and that the

employer should unconditionally allow the workers who had gone on strike back to work. Aggrieved, the employers applied to the Industrial Court for the review/interpretation of the order of 1st November 2010 in order for that court to clarify what rights and recourse the employers had as against the affected employees.

16. On 25th November 2010, the Industrial Court directed that all the matters raised by the parties that were then pending before that court be consolidated and be heard on 30th November 2010 whilst at the same time extending the orders it had given on 1st November 2010. The result was that the application by the Union dated 21st October 2010; the application by the employers dated 27th October 2010; the employers application for review of the order of 1st November 2010 and the conciliator's report filed on 11th November 2010 were to be heard and considered together. After hearing the parties on those matters over an extended period between 30th November 2010 and 10th February 2011, the Industrial Court delivered the impugned ruling on 22nd March 2011 and made the following orders:

> ***"1. That pending the full hearing and determination of this suit/dispute interlocutory injunction be and is hereby issued against the 1st and 2nd Respondents, Agents, Assigns and or any other persons from suspending, dismissing, locking-out and or evicting the claimant's members from their residential houses.***
>
> ***2. THAT all the employees who have not been allowed to resume duty due to this suit/dispute, to report back to their respective working stations within the next SEVEN (7) DAYS without any loss of any benefits from the date of suspension and or lock-out.***
>
> ***3. Full HEARING of the suit/dispute on the 30th day of March, 2011 at 11.00 am."***

17. Aggrieved, the appellants filed the present appeal.

The appeal and submissions by counsel

18. In their memorandum of appeal, the appellants complain that, in its ruling, the Industrial Court failed to consider that the Union concealed from the court that the High Court had on 14th October 2010 issued an order of injunction; that the Industrial Court should have stayed the proceedings before it pending determination of the constitutional petitions before the High Court; that the Judge erred in relying on the conciliator's report that was factually incorrect and when the conciliator had no mandate to make findings; that no reasons were given by the Industrial court for concluding that the Union had made out a *prima facie* case for the grant of a temporary injunction; and that the court erred in granting orders for resumption of duty, tantamount to orders of reinstatement to employment, at an interlocutory stage.

19. Learned counsel for the appellants Mrs. E. W Opiyo relied on her written submissions which she highlighted. She submitted that in granting the orders that he did, the learned Judge misdirected himself in that he failed to assess whether the strike notice issued by the Union *prima facie* complied with the legal requirements in Section 62(1)(a) and 76 of the Labour Relations Act on reporting the trade dispute to the Minister for conciliation; and that an order for reinstatement to employment, by its nature, is a final order that should be granted only where very special circumstances exist after a full hearing and not at an interlocutory stage.

20. Counsel submitted that in granting the impugned orders, the Judge should have considered that the Union members had disobeyed a valid order of the High Court which entitled the employers to take disciplinary action against them; that in effect the Industrial Court sanctioned disobedience of court orders by employees by granting them relief notwithstanding that they had knowingly and with impunity disobeyed court orders; that the failure by the Union to disclose to the Industrial court that the High Court had issued injunctive orders on 14th October 2010 amounted to material non-disclosure thereby disentitling the Union to injunctive relief that it had sought.

21. It was also the appellants' submission that the Industrial Court should have stayed the proceedings before it having regard to the fact that the constitutional petitions were earlier in time and also having regard to the common subject matter with those petitions.

22. Counsel concluded by urging that the Judge erred in relying on the conciliator's report despite the acknowledged factual errors therein and despite the fact that the conciliator exceeded her mandate under Section 67(1) of the Labour Relations Act by purporting to make findings on which the Judge erroneously based his decision.

23. In his very brief oral submissions, learned counsel for the Union Mr. Peter C. Onyango in opposing the appeal challenged the contention by counsel for the appellant that the Union was guilty of material non-disclosure. He pointed out that disclosure was indeed made during the hearing before the Industrial Court as a result of which the Judge addressed the question whether the High Court and the Industrial Court had concurrent jurisdiction over the matter.

24. Counsel submitted that the question of legality of the strike notice was properly within the jurisdiction of the Industrial Court and that the court acted properly in granting the orders that it did, including the orders for reinstatement. Counsel urged that the question of victimisation was a live issue before the Industrial Court and that the same had to be addressed.

Analysis and determination

25. As already noted, there were two substantive applications before the Judge on the basis of which he rendered the impugned ruling. The first application was the one by the Union filed on 21st October 2010 seeking an interlocutory injunction against the employers to restrain them from suspending, terminating, dismissing, locking out or evicting the Union members. The second one was the application dated 27th October 2010 by the employers seeking to set aside the *ex parte* injunctive order issued by the Industrial Court on 21st October 2010 pursuant the Union's application of the same date and seeking to stay the proceedings in that suit pending hearing and determination of the constitutional petitions before the High Court. Both applications were based on the then Section 12 of the Labour Institutions Act (which was

within Part III of that Act that has since been repealed under Section 31 of the Employment and Labour Relations Court Act, 2011) empowering the then Industrial Court to make interim preservation orders.

26. The grant or refusal of a temporary injunction by the lower court, as the learned Judge correctly stated, is guided by the principles in ***Giella vs. Cassman Brown [1973] E. A 358***. It calls for the exercise of judicial discretion by the lower court. The circumstances in which this Court can interfere with the exercise of discretion by the lower court were stated by the predecessor to this Court in the case of ***Mbogo and Another vs. Shah [1968] EA 93*** as follows:

> ***"…that this Court will not interfere with the exercise of…discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

27. Subsequently Madan JA articulated the same principle in ***United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] EA898*** where he stated:

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

28. Bearing those principles in mind, the only question for our determination is whether the impugned decision is clearly wrong on account of misdirection by the learned Judge. In addressing that question, we are alive to the fact that the main suit before the lower court as well as the constitutional petitions before the High Court are yet to be heard. We must therefore be guarded in our pronouncements in this appeal, lest we should prejudice the determination of the dispute by the lower court.

29. We begin with the complaint that the Judge erred in, effectively, ordering a reinstatement of the Union employees after they had been subjected to disciplinary process by the employers and some of them dismissed from employment. In ***Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR*** this Court stated that although the remedy of reinstatement is discretionary, it should not be ordered ***"except in very exceptional circumstances."***

30. In our view, the circumstances in the present case militated against granting the order for reinstatement particularly at an interlocutory stage. On the face of it, the employers had obtained a court order from the High Court on 14th October 2010 restraining the Union and its members "from causing, effecting, inciting or otherwise calling a strike". Despite that order the Union and its members appear to have gone ahead with the strike. In those circumstances, there appears, *prima facie*, to be sufficient grounds upon which the employers would be justified in taking disciplinary measures against its employees. We agree entirely with the statement by Rika, J in ***Alfred Nyungu Kimungii vs Bomas of Kenya [2013] eKLR*** that "*Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues* (sic) *as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and the employee*."

31. Had the learned Judge taken into consideration that there was in force an order of the High Court that prohibited the strike despite which the Union and its employees appear to have gone ahead with the strike, the Judge would no doubt have declined to grant the orders that he did. Related to that is the fact that in its memorandum of claim initiating the claim before the Industrial Court on 21st October 2010 and in its accompanying notice of motion on the basis of which an exparte interim injunction was issued by the Industrial Court and subsequently confirmed in the impugned ruling, the Union made no reference or mention to the proceedings in the High Court. Had the Judge considered those matters, he would no doubt have discharged the interim orders that had been issued by the court on 21st October 2010 and dismissed the Union's application of the same date. We are in the foregoing circumstances entitled to interfere with the exercise of discretion by the lower court in making the impugned decision.

32. There is another matter. The Judge did not consider or address the prayers by the employers for stay of proceedings pending the hearing and determination of the constitutional petition in the High Court. There is no doubt that the proceedings in the High Court and in the Employment and Labour Relations Court (ELRC) were precipitated by and concern the 7 days strike notice dated 11th October 2010. The ELRC has the mandate to determine disputes involving interpretation of the Constitution in their area of jurisdiction. ***(See Prof. Daniel M. Mugendi v Kenyatta University & three others 2013 eKLR; and Judicial Service Commission v. Gladys Boss Shollei & Another 2014 eKLR).***

33. Consequently, in lieu of the orders sought by the employers to stay proceedings in the ELRC pending the hearing and determination of Petition No. 62, 63 and 64 of 2010, the order that commends itself to us is to order that Petition No. 62, 63 and 64 of 2010 be transferred to the ELRC and be consolidated or heard together with ELRC case no. 1281 of 2010.

34. Having come to that conclusion, it is not necessary to address the other grievances raised by the appellants.

35. The result of the foregoing is that the appeal succeeds and is hereby allowed. The orders of the Industrial Court issued on 22nd March 2011 are hereby set aside and substituted with an order dismissing the Union's application dated 21st October 2010 with costs to the appellants. The employers' application dated 27th October 2010 is accordingly spent. The appellants shall have the costs of this appeal.

Dated and delivered at Nairobi this 27th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR